In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1710

RANKIN COUNTY BOARD OF EDUCATION, ET AL.,
Petitioners,

vs.

KENNETH W. ADAMS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RANKIN COUNTY BOARD OF
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KENNETH W. ADAMS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above mentioned cause December 1, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 524 F.2d 928 and attached as App. "A". The Order of the United States District Court dated February 3, 1975 has not been officially reported and is attached as App. "B". The order of the Circuit Court denying the Petition for Rehearing dated March 3, 1976 is attached as App. "C".

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1975. A Petition for Rehearing was denied on March 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). This Petition for Writ of Certiorari is being filed within ninety days of the denial of the Petition for Rehearing.

FEDERAL STATUTES INVOLVED

42 U.S.C. Section 1983

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. Section 1343 (3)

Sec. 1343 (3). Civil rights and elective franchise

The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

QUESTIONS PRESENTED

I

Whether the Court of Appeals had jurisdiction to decide the back pay issue since this issue was not decided by the district court and determination thereof was specifically reserved by the district court.

II

Whether the Court of Appeals had jurisdiction over the Rankin County Board of Education (Rankin County School District) to order said Board to pay back pay since this action was commenced and prosecuted under 42 U.S.C. 1983 and the Board is not a "person" within the meaning of this section.

III

Whether the Rankin County Board of Education (Rankin County School District), an agency and arm of the State, is immune from an award of back pay against it under the sovereign immunity doctrine of the common law as reaffirmed in *Hans* v. *Louisiana*, 134 U.S. 1, and *Edelman* v. *Jordan*, 415 U.S. 651.

STATEMENT OF THE CASE

This action was filed by private plaintiffs in August of 1967 naming as defendants the Rankin County Board of Education and its members in their official capacities, alleging that the said Board was operating the Rankin County School District in a discriminatory manner. Jurisdiction of this action was based *solely* upon 42 U.S.C. §1983 and 28 U.S.C. §1343 (3). The District Court, on December 31, 1969, ordered the school board to desegregate faculty and staff in accor-

dance with the opinion of the Court of Appeals for the Fifth Circuit in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211. By a report dated July 10, 1974, the District Court made findings of fact in respect to certain faculty and staff members who had raised a claim of racial discrimination in employment. The District Court ruled favorably on the claims for reinstatement of thirteen faculty and staff members and approved a stipulation entered into by the parties, resolving the reinstatement claims of twenty additional faculty and staff members.

In a report to the Court of Appeals for the Fifth Circuit dated December 23, 1974, the District Court made findings of fact that certain teachers who had requested reinstatement were properly not reemployed by the defendant school district and therefore did not grant any relief to these individuals.

By order dated February 3, 1975, the District Court adopted as a final judgment in accordance with the Federal Rules of Civil Procedure, its reports of July 10, 1974, and December 23, 1974.

Said order of February 3, 1975, Appendix "B", contains the following proviso:

> "The District Court, as part of its final order, reserves ruling on the question of whether the Eleventh Amendment to the United States Constitution [sovereign immunity] precludes either an award of back pay by this Court or this Court's approval of the stipulation entered into by and between the parties."

Plaintiffs appealed from this order of the District Court.

The Court of Appeals for the Fifth Circuit affirmed the District Court as to its findings of fact that certain teachers had not been discriminated against. But at the same time the Court of Appeals decided, without briefing or a determination by the District Court, that the *Rankin County School District* was liable for back pay to those teachers who were reinstated. This was the issue reserved by the District Court in its February 3, 1975, order.

Defendants filed a Petition for Rehearing and said Petition was denied by the Court of Appeals on March 3, 1976.

REASONS FOR GRANTING THE WRIT

I. The Writ of Certiorari Should Be Granted Since the Court of Appeals for the Fifth Circuit Did Not Have Authority to Decide the Back Pay Issue, Since This Issue Was Not Decided by the District Court; and Determination Thereof Was Specifically Reserved by the District Court.

As reflected by the District Court's order dated February 3, 1975, being Appendix "B" to this petition, the said Court "as part of its final order, reserves ruling on the question of whether the Eleventh Amendment to the United States Constitution [sovereign immunity] precludes either an award of back pay by this Court or this Court's approval of a stipulation which would resolve certain claims for reinstatement with back pay that has been raised in this case." This issue in regard to back pay was never briefed by any of the parties, nor was it argued to the Court. The Court of Appeals for the Fifth Circuit, without the benefit of facts in regard to the Rankin County School District or the law of Mississippi, held that:

> "The Rankin County School System is a locally controlled institution which is supported largely by local revenues and accordingly, the Eleventh Amendment does not bar the award of back pay to those teachers who were reinstated since the suit is in reality not against the State itself but against what is primarily a local institution."

In Footnote 4 of the opinion, the Court opined that the county school systems in Mississippi are primarily funded by local ad valorem taxes and that the funds obtained thereby are only supplemented by the State if such funds are insufficient to accomplish the educational needs of the county. As will be shown later in this petition, this is not a true statement of the law of Mississippi The Court of Appeals relied upon *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, a case out of Texas wherein the junior college was supported mainly and basically by local funding. Under the laws of the State of Mississippi, the primary funding for county school purposes is furnished by the State, and the local school district may receive some funding from local revenues. Since the Court of Appeals based its finding that the Eleventh Amendment [common-law doctrine of sovereign immunity] was not applicable to the Rankin County School District upon erroneous facts, this in and of itself should be sufficient to reverse the Court of Appeals for the Fifth Circuit and remand to the District Court for a determination of that issue after all parties have had an opportunity to make a record as to those facts which are necessary and essential before such issue may be resolved.

II. The Writ of Certiorari Should Be Granted Since Neither the Court of Appeals nor the District Court Had Jurisdiction Over the Rankin County Board of Education to Order Said Board to Pay Back Pay, Since This Action Was Commenced and Prosecuted Under the Sole Authority of 42 U.S.C. §1983; and the Board (Rankin County School District)[1] Is Not a "Person" Within the Meaning of This Section.

This action was commenced and prosecuted under 42 U.S.C. §1983, which in pertinent part states that:

> "Every person . . . who under color of state law . . . subjects or causes any citizen to be deprived of any civil rights . . . is liable for personal injuries."

The Rankin County School District is not a person as contemplated by this section. *Monroe* v. *Pape*, 365 U.S. 167; *City of Kenosha* v. *Bruno*, 412 U.S. 507. In fact, the Court of Appeals for the Fifth Circuit has specifically held that a school district is not a person under the purview of 42 U.S.C. §1983. *Adkins* v. *Duval County School District*, 511 F.2d 690; *Sterzing* v. *Fort Bent Indep. Sch. Dist.*, 496 F.2d 92. In view of the Court of Appeals' previous holding in this regard, the Petitioners cannot conceive how said Court could now require the school district to reimburse certain teachers for back pay. The Court did not even speak to this question and merely required that the said school district make such reimbursement. Petitioners acknowledge that the school board members in their official capacity were

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1. Although the Rankin County School District was not named as a party, both courts treated this case as one against the District and equated the District with the Board of Education, which was so named. We agree that there is no difference, and all monies to pay the awards will come from the School District's funds. *Hagood* v. *Southern*, 117 U.S. 52.

also parties to the lawsuit, but to require these individuals to pay monies out of the school funds of the school district would be, in effect, nothing more than a suit against such school district, which is not permissible under 42 U.S.C. §1983. As this Court made clear in *Edelman* v. *Jordan*, 415 U.S. 651, although certain state officials were named as party-defendants in *Edelman*, the funds necessary to satisfy the back-payment judgment would come from State funds and therefore was actually a suit against the State. Using the same reasoning, if the back-pay judgment in the case sub judice is to be paid out of the funds of the Rankin County School District, then in actuality this is a suit against the school district. Petitioners submit that the Court cannot by-pass the specific mandate of 42 U.S.C. §1983 as interpreted by this Court, by the legal fiction of stating that this is a suit against the school board officials and not the school district itself. While the legal fiction created in *Ex Parte Young*, 209 U.S. 123, may sustain the Court's relief in regard to reinstatement of the teachers, such will not sustain a judgment against the funds of the Rankin County School District, which district is not a person and therefore not a party to this action under 42 U.S.C. §1983.[2]

Petitioners submit that since the award of back pay must of necessity come from school funds belonging to the Rankin County School District, the Court of Appeals

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2. In this petition for certiorari, these petitioners are not asserting that the Court did not have authority to order certain affirmative relief, i.e., reinstatement of certain teachers and other school staff. Although such contention is not here made, petitioners are not admitting that such a contention may not be valid in the event the Court should determine that the Rankin County School District is an agency of the State of Mississippi. *Louisiana* v. *Jumel*, 107 U.S. 711.

for the Fifth Circuit and the District Court are without jurisdiction to require such an award under the provisions of 42 U.S.C. §1983.

III. The Writ of Certiorari Should Be Granted Since the Rankin County Board of Education [Rankin County School District] Is an Agency of the State of Mississippi and Therefore Is Immune From This Action for Back Pay Under the Sovereign Immunity Doctrine, As Reaffirmed in Hans v. Louisiana, 134 U.S. 1, and Edelman v. Jordan, 415 U.S. 651.

The Rankin County Board of Education [Rankin County School District] is an agency and arm of the State of Mississippi.

The petitioners recognize that the question of immunity in a federal forum is one of federal law, but in deciding such question, the Court is bound by the interpretation placed upon such immunity by the courts of the states involved. The Court of Appeals for the Fifth Circuit in *Louisiana Land & Exploration Co.* v. *State Mineral Board*, 229 F.2d 5, 7, in addressing the question of whether or not an agency of a state enjoys the immunity of the state, stated that such question must be resolved and "must be determined by the laws of the state." In holding that the State Mineral Board did enjoy such immunity, the Court stated:

> "Thus, the fact that the legislature chooses to call it a corporation does not alter the board's characteristics so as to make it something other than what it actually is, a mere agent of the State. Accordingly, it is clear that when the Board sues or is sued, it appears in court as an agent of its principal, the State."

This principle of law was reaffirmed by the same Court in *Tardan* v. *Chevron Oil Co.*, 463 F.2d 651.

Under Mississippi law, when a school district is created, such creation must be approved by the State Educational Finance Commission. §37-7-3, Miss. Code Ann. (1972). Although the day-to-day operation of a school district is under the supervision of the superintendent of education and a local school board, the legislature, through enactments, has prescribed specific rules and regulations to govern and control the operations of such school districts, e.g., accreditation of schools, *ibid.*, 37-17-1, et seq.; expenditure of funds, *ibid.*, 37-61-1, et seq.; purchases, *ibid.*, 37-39-1, et seq.; accounting and auditing, *ibid.*, 37-37-1, et seq.; records, enrollment and transfers of pupils, *ibid.*, 37-15-1, et seq.; curriculum, school year and attendance, *ibid.*, 37-13-1, et seq.; school district personnel, *ibid.*, 37-9-1, et seq.;[3] general provisions pertaining to education, *ibid.*, 37-11-1, et seq. An analysis of these statutes reflects that the everyday operations of the local school districts are strictly and specifically controlled by acts of the Mississippi Legislature and that although the carrying out of such operations is left to local authorities, the paramount authority is the State of Mississippi.

Although the Court of Appeals for the Fifth Circuit held that the school districts of Mississippi were funded primarily by local funds, and the State supplemented such funds only when necessary, this is an incorrect statement and the exact opposite is the true facts. Ap-

3. Detailed procedure is set out for employment and reemployment of teachers, principals and superintendents of a school district. Such includes but is not limited to form of contracts, salaries, terms, conditions, duties, etc. Further, a fair dismissal hearing procedure is provided.

parently, the Court of Appeals for the Fifth Circuit confused the law of the State of Mississippi with certain laws of the State of Texas, which were in regard to the funding of junior colleges in that state.[4] Under the laws of the State of Mississippi, funds necessary to provide for a minimum education are appropriated out of the State Treasury of the State of Mississippi. *Ibid.*, §§37-19-1, et seq. The law does require that the local district raise certain funds as matching funds, but such is only a small fraction of the funds which come from the State Treasury. The State further provides funds for transportation of pupils, *ibid.*, §§37-41-1, et seq.; state textbooks, *ibid.*, §§37-43-1, et seq.; certain funds for capital improvements, *ibid.*, §§37-47-1, et seq.; and funds for the education of exceptional children, *ibid.*, §§37-23-1, et seq.

To operate the "minimum education program" for the school year 1974-75 throughout the state of Mississippi costs a total of $220,738,222.00. Of this amount, $202,915,933.00 or 91.93% was *state* monies while only $17,822,289.00 or 8.07% was *local* (matching) monies. For the same period of time there was approximately another $18,000,000.00 of state monies distributed under other state funded programs to school districts throughout the state.[5]

These figures, standing alone, belie the Court of Appeals determination that the "county school systems

4. The Court cited as authority *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, in support of this finding wherein the funding laws of Texas were discussed in detail.

5. The official figures are not at this time available for the school year 1975-76, but the state monies will amount to a greater percent since there was an increase in regard to teacher salaries while no increase in the local matching monies.

in Mississippi are primarily funded by local ad valorem taxes and the funds obtained thereby are only supplemented by the state if insufficient to accomplish the educational needs of the county." p. 928.

Therefore, using the Court of Appeals' own criterion, i.e., funding, under the true facts as they pertain to Mississippi School Districts, that Court should have on the Petition for Rehearing determined that the District was primarily funded by state taxes and only supplemented by local taxes and, because of such funding, merely an agency or arm of the State of Mississippi and not a "local institution" and thereby protected by the doctrine of sovereign immunity.

It is therefore apparent that if the Rankin County School District is required to pay certain teachers back pay, such awards would of necessity come from monies supplied by the State of Mississippi out of the State Treasury from general revenue funds. Such funds are supplied by the State of Mississippi and are earmarked for the maintenance and operation of the school districts. Further, in *Hander*, supra, the Court of Appeals for the Fifth Circuit gave great weight to the decisions of the Supreme Court of Texas, wherein said Supreme Court had held that junior colleges are not agents of the State but are merely local districts and therefore independent entities. The Supreme Court of Mississippi in an unbroken line of cases has held that local school districts are not independent entities but are rather agencies of the State of Mississippi. *Sheedy* v. *State*, 118 So. 372, 152 Miss. 82; *Adams County* v. *State Educational Finance Comm.*, 91 So.2d 524, 229 Miss. 566; *Harrell* v. *City of Jackson*, 92 So.2d 240, 225 Miss. 815.

In *Harrell* v. *City of Jackson*, supra, the Supreme Court of Mississippi surveyed numerous decisions of that Court and the provisions of the Constitution of Mississippi and its legislative acts, and concluded that:

> "Thus, it is clear from the foregoing constitutional and legislative provisions and the adjudicated cases of Mississippi and the general rule elsewhere that the trustees of the Jackson Municipal Separate School District are agents of the State of Mississippi. . . ." 92 So.2d 244.

Since the funds to satisfy the back-pay awards in this case must inevitably come from the general revenues of the State of Mississippi, such is controlled by this Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651, and not the Court's decision in *Ex Parte Young*, 209 U.S. 123.[6] Therefore, the courts below had no authority to award back pay against these petitioners.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the decision and judgment of the Court of Appeals for the Fifth Circuit.

It is here noted that this Court on April 19, 1976, granted a petition for writ of certiorari in *Mt. Healthy City Sch. Dist. Bd. of Education* v. *Doyle*, No. 75-

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6. The case sub judice is distinguished from *Moor* v. *County of Alameda*, 411 U.S. 693, and *County of Lincoln* v. *Luning*, 133 U.S. 529. In these cases, the Court, after sifting the facts, determined that the county was not an arm or agency of the State and in fact was a local independent entity, raising its operational funds from local revenues, and further, that such had been the determination by the highest courts of the States of California and Illinois. Such are not the facts as they pertain to school districts in Mississippi.

1278, wherein the questions presented are (1) Does district court have jurisdiction over this action since *board of education* is not "person" within meaning of 42 U.S.C. §1983, and plaintiff could not properly contemplate $10,000 as amount in controversy for suit under 28 U.S.C. §1331? (Emphasis added) (2) Is city board of education immune from suit under sovereign immunity protection of Eleventh Amendment [common-law sovereign immunity]? (3) Can board of education be forced to give continuing contract to nontenured teacher it considered too immature for position? 44 U.S.L.W. 3585.

Respectfully submitted,

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APPENDIX "A"

Before BROWN, Chief Judge, MORGAN and GEE, Circuit Judges.

PER CURIAM:

In conformance with our opinion in *Adams* v. *Rankin County Board of Education*, 5 Cir., 1973, 485 F.2d 324 which ordered the implementation of a unitary school system in Rankin County, Mississippi, the District Court, upon remand, made a detailed report to the Fifth Circuit on July 10, 1974[1] which was supplemented by a report on December 23, 1974.[2] By its order entered February 3, 1975[3] the District Court adopted these reports as its final judgment and this decree resolved all issues except the following: (i) whether the District Court erred in not reinstating three teachers who were dismissed during the time when the unitary system was being implemented, (ii) whether the District Court erred in not reinstating six non-professional staff members who were dismissed but later reemployed, and (iii) whether those teachers who were reinstated pursuant to the District Court's order upon remand from this Court were entitled to back pay awards against the local school system.

[1] Dealing with these issues seriatim, we find that the District Court had ample basis upon which to conclude that the teachers were properly discharged. There was no showing that the dismissals were the result of racial discrimination, *United States* v. *Jefferson County*

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1. This report is set out in the Appendix on appeal at 62-77.
2. *See* App. at 84-86.
3. *See* App. at 112.

Board of Education, 5 Cir., 1967, 380 F.2d 385, 394, and on the contrary there was substantial evidence from which the District Judge could conclude that the teachers were incompetent. *See* District Court's report to the Fifth Circuit at p. 10, App. at 71.

Concerning the nonprofessional employees, in light of the District Court's finding that all of these employees had been re-employed we deem this issue to be moot.

[2] Finally, relying on our recent decision in *Hander* v. *San Jacinto Junior College*, 5 Cir., 1975, 519 F.2d 273, 279-80, we find that under the applicable Mississippi statutes the Rankin County School system is a locally controlled institution which is supported largely by local revenues[4] and accordingly the Eleventh Amendment does not bar the award of back pay to those teachers who were reinstated since the suit is in reality not against the state itself but against what is primarily a local institution. Accordingly, we remand this case to the District Court with the instructions that it calculate and award back pay to those teachers who were reinstated in accordance with the stipulation of the parties concerning this subject which was filed April 12, 1974 and which is set out on pages 40-58 of the appendix on appeal.

Affirmed and remanded with instructions.

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4. The county school systems in Mississippi are primarily funded by local ad valorem taxes and the funds obtained thereby are only supplemented by the state if insufficient to accomplish the educational needs of the county. *See* Miss.Code Ann. § 37-19-15 (1972). In addition, the statutes provide for a flexible tax structure which continues to tap local resources when increases in educational expenses are necessary to accomplish local educational goals. *See* Miss.Code Ann. § 37-57-1 *et seq.* (1972). Thus, it is apparent that any award of back pay would come primarily from local funds rather than out of the state treasury.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 4156(R)

KENNETH W. ADAMS, et al.,
Plaintiffs,

v.

RANKIN COUNTY BOARD OF EDUCATION, et al.,
Defendants.

ORDER

(Filed February 6, 1975)

Upon the motion of the United States, *amicus curiae*, for entry of written judgment with supportive findings and conclusions, this Court has determined that its July 10, 1974 Report, and its Supplemental and Final Report of December 23, 1974, constitute a final written order with supportive findings and conclusions.

NOW THEREFORE IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT this Court's Reports of July 10, 1974 and December 23, 1974, are hereby adopted as a final judgment in accordance with the Federal Rules of Civil Procedure. The Court, as part of its final order, reserves ruling on the question of whether the Eleventh Amendment to the United States Constitution precludes either an award of back pay by this Court or this Court's approval of a stipulation which would resolve certain claims for reinstatement with back pay that have been raised in this case.

The Clerk is directed to file this order and serve a copy on all counsel of record.

Entered this the 3rd day of February, 1975.

/s/ Dan M. Russell, Jr.
United States District Judge

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1991

KENNETH W. ADAMS, ET AL.,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae,

versus

RANKIN COUNTY BOARD OF
EDUCATION, ET AL.,
Defendants-Appellees.

Appeal From the United States District Court for
the Southern District of Mississippi

ON PETITION FOR REHEARING

(Filed March 3, 1976)

Before BROWN, Chief Judge, MORGAN and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of the Rankin County Board of Education, ET AL. in the above entitled and numbered cause be and the same is hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1710

RANKIN COUNTY BOARD OF EDUCATION, ET AL.,

Petitioners,

vs.

KENNETH W. ADAMS, UNITED STATES, ET AL.

BRIEF FOR RESPONDENTS-PRIVATE-PLAINTIFFS IN OPPOSITION TO CERTIORARI

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Supreme Court of the United States

October Term, 1975

No. 75-1710

Rankin County Board of Education, et al.,

Petitioners,

vs.

Kenneth W. Adams, United States, et al.

BRIEF FOR RESPONDENTS-PRIVATE-PLAINTIFFS IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the Court of Appeals upon which the petition is based is reported at 524 F.2d 928. An earlier opinion of the Court of Appeals, not cited by petitioners, is reported at 485 F.2d 324.

Statement of the Case

Petitioners' Statement of the Case omits these critical facts:

1. This action began as a typical comprehensive school desegregation suit initiated by black school age children against officials of the Rankin County School District. In April, 1970, the district court ordered defendants to merge

black and white faculties and implement a geographic zoning and pairing plan of pupil assignment by September, 1970.[1]

The merger of faculties resulted in the wholesale dismissal and demotion of black professionals and other personnel to an extent without parallel in Mississippi. All of the district's black principals were demoted to assistant principal and 28 black teachers were discharged; several black teacher aides and other non-professional staff were also discharged. As the Court of Appeals observed, black faculty was reduced by 26% at the moment of desegregation. Defendants' explanation for the decimation of black faculty was that black schools were "absorbed" into white schools under the desegregation plan and hence black faculty positions evaporated in the merger. 485 F.2d at 326.[2] The first opinion of the Court of Appeals, held unlawful, *inter alia*, defendants' basis for discharging black faculty members. 485 F.2d 324.

2. April 12, 1974, on remand from the Fifth Circuit's first decision, the parties entered into a "Stipulation" resolving the claims of 20 of the discharged or demoted black professionals. (Reproduced herein at 1a-17a) Included therein was an agreement that 15 of the 20 "are entitled to an award of back pay," (16a) in the total amount of $28,482. and that the "Rankin County School District shall issue checks payable to the order of each [such discriminatee in] the amount indicated." (17a)

[1] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Singleton* v. *Jackson M.S.S.D.*, 419 F.2d 1211, 1217 (5th Cir. 1969).

[2] Defendants also argued that since white schools continued to exist under the desegregation plan white teachers and principals were secure; none was dismissed as a result of desegregation.

This settlement agreement was stifled by the district court which determined to prohibit implementation until it could resolve whether the Eleventh Amendment precluded awards of back pay against local school district officials.[3]

3. As the Court of Appeals observed in its first opinion, the proceedings relating to the discharge and demotion of black personnel began with a "motion and order of the [District] Court allowing the United States to intervene on behalf of black teachers and principals who were allegedly discriminated against either in not being rehired or from demotions by the conversion from a dual system to a unitary one." 485 F.2d at 326. The government's motion of February, 1971, invoked the court's jurisdiction under 42 U.S.C. 2000e-6 and 2000h-2.

In summary, what began as a school desegregation suit advanced by black school age children evolved into a suit advanced by the United States and the original plaintiffs to remedy Rankin County's racially discriminatory personnel actions which attended the conversion of the system to unitary operation. The later proceedings are the subject of the defendants' petition for certiorari.

Reasons for Denying the Writ

1. Petitioners argue, as their first reason for granting the writ, that the Court of Appeals decided an issue not first decided by the district court, i.e., whether the Eleventh

[3] The district court was to later find that in addition to the 20 professionals covered by the stipulation, six other black teachers had been unlawfully discharged. It ordered them reinstated but again felt impelled to withhold back pay in light of Eleventh Amendment issues.

Amendment precludes an award of back pay against local school officials of Mississippi.

Petitioners fully briefed and presented the substantive issue in their petition for rehearing in the Court of Appeals. Moreover, by the time the case was decided by the Court of Appeals, the unlawfully discharged black professionals had waited more than five years—from September, 1970 through December, 1975—for a judgment clearly due them. The Court of Appeals, considering the issue closed (see *infra*, p. 5, and Appendices "B" and "C" hereto), and mindful of the stringent time requirements for conversion of school systems from dual to unitary operation, *(Alexander, supra)* properly determined that further delays in bringing the matter to judgment would be unconscionable.

2. Petitioners also assert that 1983 "was the sole authority" for this action and that Rankin County School officials, individually named in the Complaint, are not "persons" within the meaning of that statute. The jurisdictional basis for the suit, however, is not §1983 but primarily 42 U.S.C. §2000h-2 and §2000e-6. The government's right to obtain back pay against school officials under these statutes is quite properly not challenged in the petition. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). Accordingly, even if the Court were to decide against §1983 jurisdiction, the judgment to be entered against defendants would be upheld under the alternative jurisdictional statutes. Moreover, defendants agreed to the back pay awards through a Stipulation (Appendix "A" hereto) thereby waiving any immunity defense. *Edelman* v. *Jordan*, 415 U.S. 651, 673-74 (1974). For these reasons *Mt. Healthy City School Dist.* v. *Doyle*, No. 75-1278,

cert. granted April 16, 1976, can have no impact on this case.

Finally, the issue is not worthy of review because it will not likely arise in future cases: Title VII of the Civil Rights Act of 1964 extends to local school districts effective 1972, and §1983 is no longer a necessary jurisdictional basis for suits of this kind. *Fitzpatrick* v. *Bitzer*, No. 75-251, June 28, 1976, 44 LW 5120.

3. Petitioners final basis for certiorari, that a local school district in Mississippi is a state agency for Eleventh Amendment purposes, is also not a proper subject for review in this Court. First, this issue of local law is not of sufficient importance to warrant review by this Court. Secondly, the petition does not dispute that the Eleventh Amendment does not bar an award in suits brought by the United States against state agencies. Thirdly, this issue of local law (whether under Mississippi law school districts are state agencies) has been resolved against petitioners by two local United States District Judges well versed in Mississippi law. See Appendices "B" and "C" hereto. Such decisions are not reviewable in this Court. *Bishop* v. *Wood*, No. 74-1303, June 10, 1976, 44 LW 4820, 4121-22, n.10 (Determination of lower federal courts on issue of state law is controlling).

CONCLUSION

The decisions of the Court of Appeals are correct and consistent with the decisions of this Court and other courts of appeals. The petition presents no important question of law which this Court has not already settled. And for

the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

Appendix A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

CIVIL ACTION NO. 4156(R)

KENNETH W. ADAMS, et al.,

Plaintiffs,

v.

RANKIN COUNTY BOARD OF EDUCATION,

Defendants.

STIPULATION

Filed:
Apr 12, 1974

It is hereby stipulated, by and between counsel for the respective parties, that the facts contained in this stipulation are true and accurate and that the remedies agreed upon at a settlement conference on January 7, 1974, as are set out in this Stipulation will, when implemented, resolve the issues concerning the extent of relief to be afforded to 20 of the 42 faculty and other staff members involved in the orders entered by this Court on June 14, 1971 and November 1, 1973.

The parties through counsel agree that:

(1) Mary C. B. Adams was employed by the Rankin County School System as a teacher at the McLaurin High School during the 1969-70 school year. She was not re-employed by the Rankin County School System for the 1970-71 school year but she was employed for the 1970-71 school year at Alcorn College at an annual salary of $7200.

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She was offered re-employment by the Rankin County School District for the 1971-72 school year in a teaching position equivalent in duties and salary to her previously held position in the Rankin County School System. She accepted the proffered position and at the conclusion of the 1971-72 school year, she resigned and has been employed in the Jackson Public School System since her resignation. Her annual earnings, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Salary*	*Difference*[1]
1970-71	6500	7200	0
1971-72	7000	7000	0
1972-73	7400	8200	0
1973-74	7800	10,925	0
		Total	0

Further, Ms. Adams does not seek an offer of reinstatement.

(2) Walter Lee Beard was employed by the Rankin County School System as a teacher at the Gosher-Fannin School during the 1969-70 school year. He was not re-employed by the Rankin County School System for the 1970-71 school year but he was employed during 1970-71 with the Catholic Diocese of Natchez-Jackson at an annual salary of $7200. He was offered re-employment for the 1971-72 school year by the Rankin County School District and the teaching position offered was equivalent in duties

[1] Differences between the actual salary and salary if employed in Rankin County which are less than zero are indicated as zero.

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and salary to his previously held position in the Rankin County School System.

He rejected the proffered position in 1971-72, and his annual earnings at the Catholic Diocese of Natchez-Jackson, and his earnings at Mississippi Industrial and Special Service, Inc. since his dismissal in 1969-70, the salary he would have received if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Salary*	*Difference*
1970-71	6000	7200	0
1971-72	6512	7200	0
1972-73	6842	7200	0
1973-74	7000	7200	0
		Total	0

Further, he does not seek an offer of reinstatement.

(3) Everett Brown was employed during the 1969-70 school year in the Rankin County School System as a teacher, head baseball coach, and assistant football coach at Carter High School. He was offered re-employment by the Rankin County School District for the 1970-71 school year. The proffered position was not equivalent in duties and salary to his previously held position, but Mr. Brown does not seek an offer of reinstatement. He has been continually employed at Tougaloo College since the 1969-70 school year as a student union director. His annual earnings, the salary he would have made if employed in Rankin County, and the difference between those salaries is as follows:

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	Salary if Employed in Rankin County	*Actual Salary*	*Difference*
1970-71	6500	7100	0
1971-72	6812	7400	0
1972-73	7142	8000	0
1973-74	7442	8900	0
		Total	0

(4) Mildred Bryant was employed during the 1969-70 school year in the Rankin County School System as a teacher at McCall School. She was not offered re-employment for the 1970-71 school year but she was employed in Jefferson Davis County at an annual salary of $3000. She was offered re-employment in the Rankin County School System for the 1971-72 school year and she accepted the proffered position which was equivalent in salary and duties to her previously held position during the 1969-70 school year. She continued to be employed in that position, and her annual earnings, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Salary*	*Difference*
1970-71	5500	3000	$2,500 plus annual teacher salary increment for 1971-72, 1972-73, 1973-74.[2]

[2] The annual teacher salary increment represents the amount of additional salary due a teacher who, as a result of his or her dismissal from the Rankin County School System, has lost one year of full-time teaching experience. The procedure to be followed in computing this increment is set out at the conclusion of this Stipulation.

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(5) Vera Mae Gilmore was employed during the 1969-70 school year in the Rankin County School System as a teacher at the McCall School. She was not re-employed in Rankin County for the 1970-71 school year, but she was employed during that year at Leake County Schools at an annual salary of $5188. She was offered a position equivalent in salary and duties to her previously held position in 1969-70 by the Rankin County School District for the 1971-72 school year, and she accepted the proffered position in which she continues to be presently employed. She continued to be employed in that position, and her annual earnings, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	5500	5188	312

(6) Harrison Hal was employed for the 1969-70 school year by the Rankin County School System as a teacher and head basketball coach at Carter School. He was offered a teaching position for the 1970-71 school year and though the proffered position was not equivalent in duties and salary to his previously held position in Rankin County, he does not seek an offer of reinstatement. He has been continually employed in the Jackson Public School System since 1969-70. His annual earnings, the salary he would have made if employed in Rankin County, and the difference between those salaries is as follows:

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	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6500	6800	0

(7) Ira Jones was employed during the 1969-70 school year by the Rankin County School District as a teacher at the McCall School. She was not re-employed for the 1970-71 school year but she was employed for that school year in the Prentiss School District at an annual salary of $5400. She was offered re-employment by the Rankin County School District for the 1971-72 school year in a teaching position that was equivalent in duties and salary to her previously held position in the Rankin County School System and she has been continually employed in the Rankin County School System since that time. Her annual earnings, her salary if employed in the Rankin County School System, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6000	5400	600
		Total	600

(8) Estus Hood was employed by the Rankin County School System during the 1969-70 school year as a teacher and head football coach at McLaurin High School. He was not offered re-employment by Rankin County for the 1970-71 school year but he was employed during 1970-71 at Saint Anne's School in Kankakee, Illinois at an annual salary of $10,744. He has been employed at Saint Anne's since 1970-71 and he does not seek an offer of reinstatement. His

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annual salary, the salary he would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6500	10,744	0
1971-72	6700	11,088	0
1972-73	6900	11,507	0
1973-74	7100	11,846	0
		Total	0

Mr. Hood's claim for moving expenses incurred following his dismissal by the Rankin County School District during the 1969-70 school is no way affected by this stipulation and remains as an unresolved issue.

(9) Vernell Lewis was employed by the Rankin County School District during the 1969-70 school year as a teacher at the Carter and Brandon Schools. She was not re-employed by the Rankin County School District for the 1970-71 school year but she was employed for that school year as a substitute teacher in the Jackson Public School System with annual salary earnings of $1,869. She was offered re-employment by the Rankin County School District for the 1971-72 school year and the position offered was equivalent in teaching duties and salary to her previously held position in the Rankin County School System. She accepted the proffered position and she continues to be employed in that position. Her annual salary, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

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	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6000	1869	4131
		Total	4131

(10) Adell Odom was employed by the Rankin County School District during the 1969-70 school year as a teacher at Carter and Pearl Schools. She was not re-employed by the Rankin County School District for the 1970-71 school year but she did receive retirement pay and social security during that year totaling $2,361. She was offered re-employment for the 1971-72 school year by the Rankin County School District equivalent in duties and salary to her previously held position in Rankin County. She accepted the proffered position and retired at the conclusion of the 1971-72 school year. Her annual salary, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6000	2361	3639
		Total	3639

(11) Elsie Parrett was employed by the Rankin County School District for the 1969-70 school year as a teacher at the McCall School. She was not re-employed by the Rankin County School District for the 1970-71 school year and her only employment during 1970-71 amounted to earnings of $28.00. She was offered re-employment for the 1971-72 school year in a position equivalent in duties and salary to

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her previously held position in the Rankin County School System. She accepted the proffered position and has been continually employed in the Rankin County School System since that time. Her annual salary, the salary she would have made if employed in Rankin County, and the difference between those salaries for the 1970-71 school year is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6000	$28	5972—plus annual teacher salary increfor 1971-72, 1972-73 and 1973-74

(12) Israel Robinson was employed by the Rankin County School System during the 1969-70 school year as a teacher at the Carter School. He was not re-employed for the 1970-71 school year but he received $600 during that year as a church minister. He was offered re-employment for the 1971-72 school year by the Rankin County School District in a position equivalent in salary and duties to his previously held position in the Rankin County School System. He accepted the proffered position and has been continually employed in the Rankin County School System since his 1971-72 re-employment. His annual earnings, the salary he would have made if employed in the Rankin County School System, and the difference between those salaries is as follows:

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	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	6000	600	5400
		Total	5400

(13) Lottie D. Smith was employed by the Rankin County School System during the 1969-70 school year as a teacher at the Carter and Brandon Schools. She was not offered re-employment by the Rankin County School District for the 1970-71 school year but she was employed by Community Education Extension Program and Neighborhood Youth Corps at $4824 annually during that year. She was offered re-employment for the 1971-72 school year by the Rankin County School District in a teaching position equivalent in duties and salary to her previously held position in the Rankin County School System. She rejected the offer and has been continually employed since the 1971-72 school year at Neighborhood Youth Corps. Her annual earnings, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	5800	4824	976
1971-72	6000	6123.35	0
1972-73	6330	8143.35	0
1973-74	7030	7660	0
		Total	976

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(14) Clinton White was employed by the Rankin County School System as a trade and industrial education teacher at McCall School during the 1969-70 school year. He was offered re-employment by the Rankin County School System for the 1970-71 school year and he rejected the offer. He was employed for the 1970-71 school year in the Jackson Public School System and he has been employed in the Madison County School System for the 1971-72, 1972-73, 1973-74 school years. Though the position offered by the Rankin County School System for the 1970-71 was not equivalent in duties and salary, Mr. White does not seek an offer of reinstatement. His annual earnings, the salary he would have made, if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	7100	6200	900
1971-72	7600	8200	0
1972-73	7990	8500	0
1973-74	8700	9000	0
		Total	900

(15) Delores White was employed by the Rankin County School System during the 1969-70 school year as a home economics teacher at the McCall School. She was not offered re-employment by the Rankin County School System for the 1970-71 school year, but she was employed in the Jackson Public School System during the 1970-71 school year with an annual salary of $3100. She was offered re-employment by the Rankin County School District for the 1971-72 school year in a teaching position equivalent in

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duties and salary to her previously held position in the Rankin County School System. She accepted the proffered position and has been continually employed in the Rankin County School System since that time. Her annual salary, the salary she would have made if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	5600	3,360	2,240
		Total	2,240

plus the annual teacher salary increment for 1971-72, 1972-73, and 1973-74

(16) Marie White was employed by the Rankin County School System during the 1969-70 school year as a teacher at the McCall and Pelahotchie Schools. She was not offered re-employment in Rankin County for the 1970-71 school year but she was employed in the Carthage School System during that year at an annual salary of $5288. She was offered re-employment by Rankin County for the 1971-72 school year in a teaching position equivalent in duties and salary to her previously held position in the Rankin County School System. She accepted the proffered position and has been continually employed in the Rankin County School System. Her annual earnings, the salary she would have

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made, if employed in Rankin County, and the difference between those salaries is as follows:

	Salary if Employed in Rankin County	*Actual Income*	*Difference*
1970-71	5700	5288	412
		Total	412

(17) Wylma King was an elementary principal at McLaurin School during the 1969-70 school year in the Rankin County School System. She was a teacher at the Florence School for the 1970-71 school year and her annual salary during that year was $6500. She has been continually employed in the Rankin County School System and is now an elementary school principal. Her annual earnings, her salary if she had continued as a principal in the Rankin County School System, and the difference between those salaries is as follows:

	Salary if continually employed in 1969-70 position	*Actual Salary*	*Difference*
1970-71	7000	6500	500
1971-72	7500	7500	0
1972-73	8270	8270	0
1973-74	9360	9360	0
		Total	500

(18) Irvin Breland was employed during the 1969-70 school year by the Rankin County School System as an Assistant Principal at Carter High School. During the 1970-71 school year he was employed in Rankin Coun[illegible] as

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a teacher at the Pearl-McLaurin School at an annual salary of $6500. He has been continually employed in the Rankin County School System and is presently employed as Assistant Principal at Pearl Junior High. His annual earnings, his salary if he had continued as an assistant principal in the Rankin County School System, and the difference between those salaries is as follows:

	Salary if continually employed in 1969-70 position	*Actual Salary*	*Difference*
1970-71	6900	6500	400
1971-72	7400	7400	0
1972-73	8316	8316	0
1973-74	9322	9322	0
		Total	400

(19) Nathaniel Davis was employed during the 1969-70 school year as a high school coach and teacher at the McLaurin School. During the 1970-71 school year he was employed in Rankin County as a junior high coach and teacher at the McLaurin School at an annual salary of $6000. He has been continually employed in the Rankin County School System and is presently employed as math teacher and head football coach at McLaurin Jr. He is entitled to a high school coaching and teaching position and such a position will be made available to him by the Rankin County School System for the 1974-75 school year and thereafter as long as he is employed in the Rankin County School System. His annual earnings, his salary if he had continued to be employed as a high school coach and teacher in Rankin County, and the difference between those salaries is as follows:

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	Salary if continually employed in 1969-70 position	*Actual Income*	*Difference*
1970-71	6500	6000	500
1971-72	7000	7000	0
1972-73	7330	7330	0
1973-74	8040	8040	0
		Total	500

(20) Bertha Carter was employed as a business education teacher by the Rankin County School System during the 1969-70 school year at the McLaurin School. She was employed in Rankin County during the 1970-71 school year as an elementary school teacher at the Florence School at an annual salary of $5600.00. She is entitled to a position in the Rankin County School System as a business education teacher and such a position shall be offered to her by the defendants for the 1974-75 school year. Her annual earnings, the salary she would have made if continually employed as a business education teacher, and the difference between those salaries, is as follows:

	Salary if continually employed in her 1969-70 position	*Actual Income*	*Difference*
1970-71	5600	5600	0
1971-72	6212	6212	0
1972-73	6622	6622	0
1973-74	7312	7312	0
		Total	0

On the basis of above, the following persons are not entitled to an award of back pay:

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1. Mary C. B. Adams
2. Walter Beard
3. Everett Brown
4. Harrison Hal
5. Estus Hood —however his claim for moving expenses remains an unresolved issue as previously noted.

The following persons are entitled to an award of back pay as indicated:

	Name	*Amount*
1.	Mildred Bryant	$2500*
2.	Vera Mae Gilmore	312*
3.	Ira Jones	600*
4.	Vernell Lewis	4131*
5.	Adell Odom	3639
6.	Elsie Parrett	5972*
7.	Lottie D. Smith	976
8.	Israel Robinson	5400
9.	Clinton White	900
10.	Deloris White	2240*
11.	Marie White	412
12.	Wylma King	500
13.	Irvin Breland	400
14.	Nathaniel Davis	500
15.	Bertha Carter	0
	Total	28,482.

All of the persons listed above have been informed of the relief agreed upon and agree that such relief would satisfy

* Indicates that annual teacher salary increment is due in addition to the amount indicated.

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all claims (except for attorneys' fees) they might have with respect to the issues in this case.

The parties, through their respective counsels, also agree that the following procedure will be implemented to carry out this stipulation:

> For each person listed above as being due an award of back pay, the Rankin County School District shall issue checks payable to the order of each person as to the amount indicated. Where a person is due annual teacher salary increments, the Superintendent of Schools for the Rankin County School District shall calculate the amount of the increment due each person, and shall submit, through counsel, these computations to counsel for the plaintiffs and counsel for the United States, and following their approval, checks shall be issued for each person in the amount as approved.

The parties further agree that the above facts may be admitted into evidence in lieu of other proof or testimony and that the awards or other relief due and the procedures for implementation, set out above, may be incorporated in an appropriate order of this Court.

This agreement shall in no way affect the rights of any other personnel involved in this case, whose claims for reinstatement, back pay, and other appropriate equitable relief shall be determined at subsequent hearing.

Respectfully submitted,

/s/ Melvyn R. Leventhal
Counsel for the [private] Plaintiffs

/s/ Billy G. Bridges
Counsel for the Defendants

/s/ J. Gerald Hebert
Counsel for the United States

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

CIVIL ACTION NO. 4692

BENNIE G. THOMPSON, ET AL.,

Plaintiffs,

v.

MADISON COUNTY BOARD OF EDUCATION, AND ROBERT E. COX, SUPERINTENDENT OF THE MADISON COUNTY SCHOOL DISTRICT,

Defendants.

This case is before the Court on remand by the Fifth Circuit Court of Appeals with directions to decide the applicability of the United States Supreme Court's decision in *Edelman* v. *Jordan,*[1] to the plaintiff's claim for back pay.

In footnote twelve of *Edelman,* supra, the Court stated that the actions of a county or county officials may be considered state actions for purposes of the Fourteenth Amendment, but they are not necessarily state actions for purposes of the immunity protections of the Eleventh Amendment.[2]

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[1] 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662.

[2] 12. "The Court of Appeals considered the Court's decision in Griffin v. School Board, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964), to be of like import. But as may be seen from Griffin's citation of Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also Moor v. County of Alameda, 411 U.S. 633, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). The fact that county policies executed by the county officials in Griffin were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."

Appendix A

Under Mississippi law counties are separate legal entities from the state and have the right to sue and be sued in their own name.[3]

The County Board of Education has control of all funds provided for the support of the county schools.[4] They also have the power to hire principals and teachers and other non-instructional personnel.[5] They can enter into contracts for transportation and to make capital improvements.[6]

In addition to the required local ad valorem tax effort of each county for support of its schools, the county board of education has the power to request an additional tax levy "for all other lawful operating and incidental expenses of such school district."[7]

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[3] Miss. Code Annotated 1972, § 11-45-17; See also *Madison County Board of Education* v. *Miles,* 252 Miss. 711, 173 So.2d 425 (1965).

[4] Miss. Code Annotated 1972, § 37-5-31 provides: "The county boards of education shall have full control of the distribution, allotment and disbursement of all minimum education program funds provided for the support and operation of the county school system whether such funds be derived from state appropriations, local ad valorem tax collections, or otherwise, etc."

[5] Miss. Code Annotated 1972, §§ 37-9-15, 37-9-17, 37-9-3.

[6] Miss. Code Annotated 1972, §§ 37-7-313, 37-47-27.

[7] Miss. Code Annotated 1972, §§ 37-57-1, 37-57-21.

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Therefore, since county boards of education are separate legal entities from the state, with separate funds and accounts and with tax-levying authority, they are not within the immunity of the Eleventh Amendment under principles expressed in *Edelman,* supra.

The parties stipulated in this action that the amount of earnings plaintiff Evelyn K. Thomas would have received had she continued to be employed with the Madison County schools, less her interim earnings, with the addition of 6% interest per annum to the present, is $22,293.68. She is entitled to this amount because back pay has been held to be an integral part of the equitable relief of injunctive reinstatement.[8]

This Court, after considering the criteria set out in *Johnson* v. *Georgia Highway Express, Inc.,* (5 CA) 488 F.2d 714, awards counsel for the plaintiff a reasonable attorney's fee of $3,900.00, based upon 195 hours of work at $20.00 per hour.

It is the opinion of the Court that the Eleventh Amendment provides no immunity for defendants under application of the Supreme Court's holding in *Edelman,* supra, and, therefore, defendants are liable for back pay to plaintiff Evelyn Thomas for wrongfully discharging her. Defendants are also liable for reasonable attorney's fees as set out in the opinion.

An order accordingly may be presented for entry within five days under the rules of this Court.

/s/ HAROLD COX

UNITED STATES DISTRICT JUDGE

July 21, 1975

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[8] *Harkless* v. *Sweeny Independent School District,* (5CA) 427 F.2d 319, cert. denied, 400 U.S. 991.

Appendix C

"It is suggested by defense counsel that the Eleventh Amendment may bar an award of attorney fees against the Board of Trustees of the Clarksdale Municipal Separate School District since it is an arm of the State of Mississippi. We summarily reject the Eleventh Amendment argument as here-applicable. In our view, this municipal school district is not a part of the state for Eleventh Amendment purposes; it is no more than a local educational agency. The district's trustees are appointed by the governing authorities of the City of Clarksdale; the district has local taxing power, it may enter into contracts, sue and be sued, issue bonds and incur indebtedness to buy land, erect school buildings and make other capital improvements. True enough the board receives from the state a substantial portion of its operating expenses to pay teachers' salaries and administrative costs, but it has lawful power to, and very probably does, supplement state funds by local taxation levied upon property situated within the separate school district. Under Mississippi law, a municipal separate school district cannot claim Eleventh Amendment immunity, or assert that any money judgment rendered against it is, in effect, a charge upon the state's treasury. That preliminary argument is therefore rejected."

Ruling of the Court, *Henry* v. *Clarksdale M.S.S.D.,* D.C. 64-28-K, N.D. Miss., November 10, 1975. pp. 11-12 (Judge Keady).

[Significantly, counsel for defendants in *Henry* v. *Clarksdale M.S.S.D.,* Semmes Luckett, Esq., one of the State's leading school board lawyers, has not appealed Judge Keady's determination.]

No. 75-1710

In the Supreme Court of the United States

OCTOBER TERM, 1976

RANKIN COUNTY BOARD OF EDUCATION, ET AL.,
PETITIONERS

v.

KENNETH W. ADAMS, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,
DREW S. DAYS III,
Assistant Attorney General,
WALTER W. BARNETT,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1710

RANKIN COUNTY BOARD OF EDUCATION, ET AL.,
PETITIONERS

v.

KENNETH W. ADAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation of October 4, 1976.

STATEMENT

Private plaintiffs initiated this school desegregation suit in August 1967, alleging that the Rankin County Board of Education and its members were violating 42 U.S.C. 1983 by operating the school system in a racially discriminatory manner.[1] The dis-

[1] The jurisdiction of the district court was invoked under 28 U.S.C. 1343(3).

trict court concluded that a violation of the Constitution had occurred and ordered the School Board to implement a "freedom of choice" plan to desegregate the schools.

In 1969 plaintiffs sought revision of the "freedom of choice" desegregation plan in light of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, and *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (C.A. 5). On December 31, 1969, the district court ordered petitioners to change faculty and staff assignments, in accord with the *Singleton* requirements, not later than February 1, 1970.[2] In April 1970 the district court ordered a new desegregation plan, incorporating its earlier order regarding reassignment of faculty and staff, to be implemented for the 1970–1971 school year.

[2] The court required (order filed January 2, 1970, p. 2):

"If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

"Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district."

The United States sought leave to participate in this case as *amicus curiae* with the rights of a party. In February 1971 the district court, finding that "the maintenance and preservation of the due administration of justice and the integrity of the judicial process requires that the public interest be represented" in this case, ordered [3]—

> that the United States of America be and is hereby designated to appear and participate in this action before this Court as amicus curiae, with the right as such to submit pleadings, evidence, arguments and briefs, to move for injunctive and other necessary and proper relief, and to initiate such further proceedings that may be necessary and appropriate.

The United States then immediately moved the district court [4]—

> to require the defendants to offer to rehire and award back pay to all Negro teachers who have been discriminatorily dismissed by Rankin County School officials subsequent to January 2, 1970, to reinstate all former Negro principals and assistant principals who were discriminatorily demoted by Rankin County School officials subsequent to January 2, 1970, and to adopt objective non-racial criteria for the demotion and dismissal of faculty and staff members.

The district court held an evidentiary hearing. After concluding that there had been "glaring defi-

[3] Order filed February 26, 1971.

[4] Motion for Enforcement of the Court's Order, dated February 25, 1971, p. 1.

ciencies"[5] in the enforcement of its previous orders,[6] the court directed petitioners immediately to formulate non-racial, objective criteria for use in hiring faculty and staff.[7] The court also ordered that black faculty and staff not retained after January 2, 1970 (the date faculty desegregation was ordered), "be re-evaluated, under the proper standards, and those who qualify equally to white teachers hired since January 2, 1970, must be offered the opportunity for reemployment * * *."[8] The court set for later consideration the identification of individual staff members "who ultimately are found to have been discriminatorily dismissed and who then may be due back pay."[9]

The court of appeals held that the district court had used the wrong legal standard in passing upon the propriety of the faculty and staff dismissals. 485 F. 2d 324, 326. It stated that under the principle announced in *United States* v. *Jefferson County Board of Education,* 380 F. 2d 385, 394 (C.A. 5), certiorari denied, 389 U.S. 840, faculty members dismissed during the desegregation process who are qualified for the jobs must be rehired over new persons, regardless of the qualifications of the new persons. 485 F. 2d at 326. It remanded the case to the district court with

[5] Opinion and Order filed June 16, 1971, p. 3.

[6] There had been a 26-percent decline in the number of black teachers in 1970–1971, the year the new desegregation plan was implemented. 485 F. 2d 324, 326.

[7] Opinion and Order filed June 16, 1971, p. 7.

[8] *Ibid.*

[9] *Id.* at 3.

the following directions (485 F. 2d at 327): "If black educators have been discriminated against, in spite of their qualifications for the job the Court must order their reinstatement with appropriate backpay and other equitable relief as required in each individual circumstance." The court of appeals also instructed the district court to make findings of fact and conclusions of law with respect to each person who raised the claim of faculty or staff discrimination. *Ibid.*

On remand the district court again required petitioners immediately to adopt objective, non-racial criteria for selection and retention of faculty and staff and to apply these criteria "to all of the faculty and staff employed by the school district at the time of the dismissals or demotions in question, which was on or about the conclusion of the 1969–70 school year."[10]

At the time of the remand, 42 faculty and staff members had asserted that they had been dismissed or demoted in violation of the *Singleton* requirements and the district court's orders. On July 11, 1974, the district court filed a "Report to the Fifth Circuit Court of Appeals" containing findings of fact with respect to these 42 persons. The court concluded that 13 persons had been the victims of racial discrimination and approved a stipulation of the parties (see Adams Br. in Opp. App. 1a–17a) to the extent that it resolved the reinstatement claims of 20 additional faculty and staff members.[11]

Although the stipulation also provided for awards of back pay to certain former employees, the district

[10] Order filed November 12, 1973, p. 2.

[11] Report to the Fifth Circuit Court of Appeals, filed July 11, 1974, p. 12.

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court refused to approve any award of back pay and explicitly reserved its ruling on that issue. The court stated that it had "grave misgivings that the assessment of such liability against the board will run afoul of the recent holding of the Supreme Court in *Edelman* v. *Jordan* * * *." [12] The court also reserved ruling on that portion of the United States' April 12, 1974, motion seeking back pay, concluding that the United States' status as a virtual plaintiff was immaterial to the sovereign immunity question.[13] In a "Supplemental Report to the Fifth Circuit Court of Appeals" the district court again reserved ruling on the propriety of back pay awards, this time noting that a similar issue was pending in another case before the Fifth Circuit.[14]

On February 3, 1975, the district court adopted "as a final judgment" its "Reports" to the court of appeals. Once again the district court stated that it "reserves ruling on the question of whether the Eleventh Amendment to the United States Constitution precludes either an award of back pay by this Court or this Court's approval of a stipulation which would resolve certain claims for reinstatement with back pay that have been raised in this case" (Pet. App. A3).

The private plaintiffs appealed the district court's failure to order the reinstatement of nine other faculty and staff members and its failure to award back

[12] *Id.* at 12–13.

[13] *Id.* at 13, 15.

[14] Supplemental Report to the Fifth Circuit Court of Appeals, filed December 20, 1974, pp. 2–3.

pay. The United States filed a brief as *amicus curiae* in the court of appeals supporting plaintiffs regarding the reinstatement claim. The United States stated with respect to back pay, however, that "we do not believe that the court's reservation of that issue is properly appealable at this time." [15]

The court of appeals affirmed the district court's disposition of the requests for reinstatement. 524 F.2d 928.[16] As to the back pay issue, the court held (*id.* at 929):

> [T]he Eleventh Amendment does not bar the award of back pay to those teachers who were reinstated since the suit is in reality not against the state itself but against what is primarily a local institution. Accordingly, we remand this case to the District Court with the instructions that it calculate and award back pay to those teachers who were reinstated in accordance with the stipulation of the parties concerning this subject which was filed April 12, 1974 * * * or by order of the District Court * * *.

DISCUSSION

Petitioners present questions concerning (1) the jurisdiction of the court of appeals to direct the award of back pay to the reinstated teachers; (2) the Eleventh Amendment immunity of a school board against an award of damages for a violation of the Constitution; and (3) the amenability of a school board to

[15] Br. 6 n. 16.

[16] The opinion set out in Pet. App. A1–A–2 was amended following a limited grant of rehearing at the request of the private plaintiffs and consequently should be disregarded.

suit under 42 U.S.C. 1983. The United States submits that the petition should be denied.

There is a substantial question whether the court of appeals had appellate jurisdiction to pass upon the back pay issue, but the peculiar facts of this case—including a 1974 stipulation between the parties that back pay awards were appropriate—render it sufficiently unusual that review by this Court is inappropriate. The Eleventh Amendment issue has been carefully considered by two other district judges in Mississippi and by the court of appeals in this case; each has resolved it adversely to the Board's position. Finally, the question whether a school board may be sued under Section 1983 either has not been properly preserved by the Board or, if preserved, remains open to argument in the district court on remand. We elaborate on these observations below.

1. Although the district court called its December 1, 1975, order a "final order," it was "final" only to the extent that it disposed of the requests for reinstatement. The district court explicitly reserved decision on the request for awards of back pay. The court's order therefore was not final in all respects. *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737.

The portions of the order denying reinstatement to nine persons were appealable because they constituted a denial of requests for equitable relief. The request for back pay was a request for restitution, also a form of equitable relief. See *Porter* v. *Warner Holding Co.,* 328 U.S. 395; *Morelock* v. *NCR Corp.,* 546 F. 2d 682 (C.A. 6) (collecting cases). But the district court's decision to postpone resolution of the issues raised by

the request for back pay was not the denial of an interlocutory or permanent injunction. It also was not a "final decision" within the meaning of 28 U.S.C. 1291. It therefore was not independently appealable.

The fact that the reinstatement issues were before the court of appeals did not give it appellate jurisdiction of the request for back pay. A statute allowing interlocutory appeals concerning one portion of a court's order does not by that token permit an appellate court to pass upon every unresolved claim for relief pending before the district court. As the Court stated in *Ex parte National Enameling and Stamping Co.,* 201 U.S. 156, 162, in construing a predecessor of Section 1292(a)(1), "[o]bviously that which is contemplated is a review of the interlocutory order [or injunction], and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree." [16]

[16] See also *New York* v. *Nuclear Regulatory Commission,* 550 F. 2d 745, 759–761 (C.A. 2); *Drop Dead Co.* v. *S. C. Johnson & Son, Inc.,* 326 F 2d 87 (CA. 9), certiorari denied, 377 U.S. 907; *Loew's Drive-In Theatres, Inc.* v. *Park-In Theatres, Inc.* 174 F. 2d 547 (C.A. 1), certiorari denied, 338 U.S. 822; *Caterpillar Tractor Co.* v. *International Harvester Co.,* 120 F. 2d 82 (C.A. 3.)

There is an exception to this rule if resolution of the issues controlling the nonappealable matters would control resolution of the matters properly appealable; in these circumstances, the court will rule upon the nonappealable matters in the interest of judicial economy. *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, 287. The issues underlying the back pay claims in the present case, however, need not have been resolved in order to dispose of the reinstatement claims, and consequently this exception does not apply. Moreover, the court could not dispose of the request for restitution by reaching and deciding any of the back pay issues. No resolution of the request for back pay would either bring the case to an end or obviate the need to decide other issues properly before the court.

The court of appeals did not articulate its reasons for passing on the back pay question.[17] It would have been entitled to have concluded, however, that the district court's continuing refusal to decide an issue that had been pending since 1971 (see pages 3–6, *supra*), in a case in which the parties had stipulated in 1974 that back pay relief was appropriate (see page 6, *supra*), warranted the exercise of supervisory jurisdiction in the nature of mandamus. Cf. *Connor* v. *Coleman*, 425 U.S. 675; see also *United States* v. *Lynd*, 301 F. 2d 818, 822 (C.A. 5) (failure to rule on motion for preliminary injunction was "refusing * * * an injunction" within the meaning of 28 U.S.C. 1292(a)(1)); *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 744–745. Use of mandamus, or of an action of that nature, would have been particularly appropriate here, since the only reason the district court gave for its lengthy delay in disposing of the request for back pay—the Eleventh Amendment question—does not appear to pose a substantial barrier to awards of back pay (see pages 11–12, *infa*).

[17] The Fifth Circuit has stated that, under certain circumstances, it will pass upon unresolved back pay claims whenever it has jurisdiction of other portions of a case. See *Myers* v. *Gilman Paper Corp.*, 544 F. 2d 837, 847. It relied on *Deckert*, *supra*, as authority for this decision, but for the reasons we have discussed at pages 9–10 and n. 16, *supra*, this disposition may be improper to the extent it represents an assertion of appellate jurisdiction.

Consequently, although the matter is not free from doubt, the court of appeals' disposition of the requests for back pay was not a usurpation of jurisdiction. Facts like those of this case are unlikely to recur frequently, and we therefore believe that the jurisdictional issue does not presently require the attention of this Court.[18]

2. The two other questions presented are whether petitioner Rankin County Board of Education possesses Eleventh Amendment immunity against a suit for damages in federal court and whether the Board is a "person" within the meaning of 42 U.S.C. 1983. Although these are not issues that a court of appeals should be quick to decide in advance of their resolution by the district court, their resolution in this case does not appear to have been incorrect or prejudicial to petitioners.

a. Petitioners' contention that the Eleventh Amendment erects a shield against suit in federal court "turns on whether the [Rankin County Board of Education] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law." *Mt. Healthy City School District Board of Education* v. *Doyle*, No. 75–1278, decided January 11,

[18] If review of a similar issue should prove to be warranted, a case such as *Myers* v. *Gilman Paper Corp.*, *supra*, might be a more appropriate vehicle.

1977, slip op. 5. That inquiry often may involve the taking of evidence or the consideration of local laws that would not appropriately be undertaken in the first instance by a court of appeals. The local law that governs the present case, however, already has been thoroughly canvassed by other district courts in Mississippi [19] and was expressly considered by the court of appeals (see 524 F. 2d at 929 and n. 4). The Board, which did not raise this defense below, has not suggested what evidence it might adduce on this issue in the district court. Accordingly, in the absence of any suggestion of prejudice (cf. *Singleton* v. *Wulff*, 428 U.S. 106, 120), the court of appeals was entitled to resolve the Eleventh Amendment issue. The proper resolution of that question depends primarily upon the interpretation of state law and does not warrant review by this Court.

b. The question whether petitioner Rankin County Board of Education is a "person" against which damages may be awarded under Section 1983 is "an extremely important question and one which should not be decided on [an inadequate] record." *Mt. Healthy, supra,* slip op. 3. It is a question that has divided the courts of appeals.[20] The court of appeals did not address the issue in this case, nor did the district court.

[19] See Br. in Opp. App. 18a–21a.

[20] The Eighth Circuit alone has held that school districts are "persons" under Section 1983. Compare *Keckeisen* v. *Independent School District 612*, 509 F. 2d 1062 (C.A. 8): and *Floyd* v. *Trice*, 490 F. 2d 1154 (C.A. 8); with *Mims* v. *Board of Education*, 523

It may be unnecessary to reach the issue here because individual members of the Board of Education, as well as the Board itself, have been named as defendants. If the Board is not a "person" it may be dismissed as a party and its individual members ordered to pay damages for the consequences of their acts of racial discrimination. Following the reasoning of *Monroe* v. *Pape,* 365 U.S. 167, several courts of appeals have held that this is the proper procedure.[21] But two other courts of appeals—including the Fifth Circuit *en banc* in a decision rendered after the decision of the panel in the present case—have held that, if an entity that is not a "person" agrees to reimburse its officers or employees for any liability they may incur, then they are not amenable to suit under Section 1983. See *Muzquiz* v. *City of San Antonio,* 528 F. 2d 499 (C.A. 5) (*en banc*), petition for a writ of certiorari pending (No. 75–1723); *Monell* v. *Department of Social Services,* 532 F. 2d 259 (C.A. 2), certiorari granted, January 25, 1977 (No. 75–1914). These

F. 2d 711 (C.A. 7); *Burt* v. *Board of Trustees*, 521 F. 2d 1201 (C.A. 4); *Sterzing* v. *Fort Bend Independent School District*, 496 F. 2d 92 (C.A. 5); *Akron Board of Education* v. *State Board of Education*, 490 F. 2d 1285 (C.A. 6), certiorari denied, 417 U.S. 932.

The issue arises in this case only in the context of a demand for back pay; petitioners do not seek review of the order to reinstate certain persons (see Pet. 8 and n. 2). But petitioners' argument that Section 1983 does not apply to school boards is troubling because, if accepted, it might foreclose the possibility of even injunctive relief against racial discrimination by school boards, in the absence of a special authorizing statute such as Title VII of the Civil Rights Act of 1964.

[21] See *Burt, supra; Akron Board of Education, supra; Sterzing, supra.*

courts reason that the school district or other non-"person" is the "real" defendant in such cases because it will pay the judgment, and that consequently the district court lacks power over all defendants, including natural persons who in other circumstances undoubtedly would be "persons" under Section 1983.[22]

Muzquiz and *Monell,* if followed, would allow States and other entities to erect for their employees an absolute shield of immunity against damages actions. By generously offering to reimburse employees, States could prevent their employees from having liabilities to meet. This might preclude some injured persons from recovering at all.

However that may be, the Court need not consider these problems in the present posture of this case. It is not clear what arrangement petitioner Board of Education may have for reimbursing its members for any damages liability, and it is not clear whether the Fifth Circuit would apply *Muzquiz* to a case, like this one, in which the back pay liability is predicated upon the violation of an injunction issued by the district court.[23]

[22] *Monell* holds that agents and employees who will be reimbursed for damages liability are "persons" for purposes of injunctive relief.

[23] Respondents argue that the Section 1983 contentions of petitioners are not presented in this case because the district court has jurisdiction under Title VII of the Civil Rights Act of 1964, 78 Stat. 266, 261, as amended, 42 U.S.C. (Supp. V) 2000h–2 and 2000e–6 (Br. in Opp. 4). This argument apparently stems from respondents' mistaken belief that the United States "intervened" (Br. in Opp. 3) in this case under Title VII. Although the court of appeals characterized the participation of the United States as

More importantly, petitioners did not raise this issue until their petition for rehearing in the court of appeals, and that court did not pass upon it (see 524 F.2d at 928–929). Petitioners thus have not properly preserved the issue for resolution by this Court. Indeed, petitioners' stipulation that the reinstated teachers were entitled to back pay (Br. in Opp. App. 16a–17a) may implicitly waive this contention.[24] Because this case involves a violation of an injunction[25] and because the court of appeals did not address the issue, it is unnecessary for the Court to hold this case pending its disposition of *Monell.*

3. The Court should deny the petition. If, however, the Court determines that the court of appeals' treatment of the case was improper, we respectfully submit that it would be appropriate for the district court

"intervention" (485 F. 2d at 326), that is incorrect. The United States is proceeding by leave of the district court as *amicus curiae* with the rights to file pleadings and move for relief, but it is not a party and it has not filed a complaint. It did not state, in its motion of February 1971 or in any other paper filed in the district court, that it was invoking the district court's jurisdiction under the Civil Rights Act of 1964.

Respondents also contend that by filing the stipulation the Board of Education waived any argument based on Section 1983. But a true "jurisdictional" defect may not be waived, because the consent of the parties does not confer subject matter jurisdiction upon the district court. *Mt. Healthy, supra,* slip op. 4.

[24] If this defense to a Section 1983 action cannot be so waived, then petitioners would be free to present it to the district court on remand, since the court of appeals has not ruled on it.

[25] The district court's injunction was appropriate whether or not it had the authority to award back pay (*Edelman* v. *Jordan*, 415 U.S. 651), and once the injunction had been entered petitioners were obliged to comply (*Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 438–440).

to be directed to render a final judgment on the back pay issues within a short time after receiving this case on remand. The first motion for back pay was filed in 1971, the parties stipulated in 1974 that back pay was due, and a final resolution of this case is long overdue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977